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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 674.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioner,

vs.

EFFIE K. SIMPSON, As Administratrix of the Estate of A. E. SIMPSON, Deceased,
Respondent.

REPLY BRIEF OF PETITIONER.

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(36,488)

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I.

Respondent's brief, pages 1 to 10, sets forth facts stated to be in addition to those set forth in petitioner's petition for certiorari and brief.

The alleged additional facts will be found, we believe, to be merely an enlargement of, but in no material respect different from those stated by petitioner.

Respondent admits, page 4, that it was the duty of every one of the crew, including the engineer Simpson, to stop and wait at McNeil until train No. 18 arrived.

It is unquestioned that the train did not so wait, but that the engineer proceeded with the train from the siding at McNeil onto the main track and into collision head-on with train No. 18.

At pages 5 and 6 of petitioner's petition the fact basis of the last clear-chance doctrine was stated in effect to be that the conductor in the caboose, when called on by brakemen to stop the train, asked for the train orders and got them from the cupola and while reading them the collision occurred.

Respondent's brief, page 5, furnishes the statement of the witness for respondent to such effect as follows:

> "Craig was standing there and he told Craig to get up there and hand him the orders; Craig did that and while he (De Maine) was looking at them, we hit" (Rec., p. 43).

It thus appears conceded the conductor did not know the contents of train order 104 or that it was then effective, and so called for the train orders and while examining them the collision occurred.

Along with this testimony of respondent that the collision occurred while the conductor was reading the train orders, other testimony of respondent is by respondent referred to tending to show that the train could have been stopped short of the actual point of collision if the conductor had complied with the request of the brakeman

at the time the brakeman made the request to apply the brakes, but before the time the conductor secured the orders to find out how they read. This evidence is referred to in order to show, as contended for by respondent at page 10, that there would have been 2,800 feet between the point at which the train might have been stopped had the conductor applied the brakes when the brakeman requested him to, and the actual point of collision. This contention entirely disregards the fact the petition alleges the conductor **after** discovering the peril of Simpson negligently failed to stop the train and that respondent's testimony is the conductor only actually knew Simpson was violating train orders at or after the moment of collision. Had the conductor stopped his train he could not thereby stop oncoming train 18 which, after making the curve, came into collision with the conductor's train. The stopping of one train would not stop the other, and it cannot be fairly said that the collision would have been avoided had Simpson's train been stopped by the conductor's applying the brakes when requested by the brakeman.

The negligence of Simpson in disobeying the order continued every moment of the time from the time the train left the siding until the collision, and it therefore cannot be said, as a fact as respondent contends, that any negligence of the conductor was LATER in point of time to that of Simpson, the engineer.

II.

At pages 12 to 27 respondent seeks to justify the action of the Arkansas courts in allowing recovery.

At page 13 it is admitted that the only claimed basis of liability was the petition allegation to the effect that De Maine, the conductor, "after discovering the peril of the deceased A. E. Simpson," negligently "failed to apply the air brakes from the rear and stop said train, thereby causing the train upon which deceased was riding to collide with another train operated by the agents and servants of the defendant upon said main line, causing the deceased to receive injuries from which he thereafter died."

Recovery, therefore, was on the theory that the conductor had discovered the peril of Simpson and thereafter negligently failed to stop the train.

The evidence is, as above stated, that the conductor whose attention was called by the brakemen to their understanding of the contents of the order were called on by the conductor to furnish the orders from the cupola of the caboose, which were secured, and the conductor was reading them to determine their effect when the collision happened. It thus appears by respondent's evidence that the conductor did not know until at or after the collision what order 104 contained, or whether it was still an outstanding order. Recovery should have been

denied because it was not shown the conductor discovered the peril in time to stop the train and avoid the collision.

It is necessary under federal decisions that actual knowledge be proved to establish a last-chance case (Wheelock v. Clay, 13 Fed. [2d] 972, cited with approval in Kansas City S. R. Co. v. Ellzey, 275 U. S. 236, 241).

Assuming, notwithstanding that the conductor had discovered the peril through Simpson's disobedience of the train order, and had thereafter negligently failed to cause the train to stop, and that its stopping would have been at a place short of where train 18, coming around the curve, would have stopped, it is the basic contention of respondent that this conduct on the part of the conductor was later in point of time than the negligence of Simpson in violating the order, though such violation by Simpson continued from the time he left the siding until the time of the collision.

The mere statement of this contention, it would seem, ought to end it.

Respondent, arguing on this basis, takes the position that in the Wiles, Frese, Davis, Sigmon and Caldine cases this Court merely held that the negligence of the injured one occurred at the same time as the negligence of some other employe of the railroad company, and in none of these cases denied recovery if there was negligence on the part of the railroad employes later in point of time. These cases have been digested in our opening brief, along with the citation of numerous others in support of the proposi-

tions appearing on page 4 of petitioner's brief. In these cases it appears that without the negligence of the railroad employe other than the claimant the accident would not have occurred. Such was the conclusion reached by Judge Dennison in referring to these cases in Southern Railway Co. v. Hilton (C. C. A. 6th, 1930), 37 Fed. (2d) 843, certiorari denied 281 U. S. 745. Such was also the conclusion reached in Unadilla Valley R. Co. v. Dibble (C. C. A. 2nd, 1929), 31 Fed. (2d) 239, and Bradley v. Northwestern Pac. R. Co. (C. C. A. 9th, 1930), 44 Fed. (2d) 683. In all of these cases this and the lower courts considered how manifestly unjust it would be to hold an employer liable for the results of a collision resulting in great loss of life and property caused by a train operative violating safety train orders.

The holding has been that it would be a perversion of the act to allow recovery in such a case.

Respondent does not even refer to this basic reason for these cases, but resorts to the apparently baseless contention that because the conductor was as negligent in his passive conduct as the engineer was in his active conduct of going upon the main track into collision, recovery should therefore be had on behalf of the one actively negligent. In the Caldine case this Court disposes of such a contention:

> "A failure to stop a man from doing what he knows that he ought not to do hardly can be called a cause of his act."

At page 12 of petitioner's brief authorities were referred to for the proposition that the last-clear-chance doctrine does not prevail in the federal courts in a case of this sort, where the engineer's violation of his order continued as the proximate cause of the collision up to the moment of collision.

At page 27 respondent cites and quotes from Kansas City Southern Railway Co. v. Ellzey, 275 U. S. 236, cited by petitioner. The matter quoted by respondent is from page 241 of the opinion. We quote first the two sentences appearing in respondent's brief at page 27, and then in addition the matter that follows, to show the holding of this Court:

> "This language suggests that the Circuit Court of Appeals thought this case to be governed by the doctrine of the last clear chance. That doctrine, rightly applied in the Chunn case, amounts to no more than this, that a negligent defendant will be held liable to a negligent plaintiff if the defendant, aware of the plaintiff's peril, or unaware of it only through carelessness, had in fact a later opportunity than the plaintiff to avert an accident (Grand Trunk R. Co. v. Ives, 144 U. S. 408, 428, 36 L. ed. 487, 492, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; Inland & S. Coasting Co. v. Tolson, 139 U. S. 551, 558, 35 L. ed. 270, 272, 11 Sup. Ct. Rep. 653). **In the cases applying the rule the parties have been engaged in independent courses of negligent conduct.** The classic instance is that in which the plaintiff had improvidently left his animal

tied in a roadway, where it was injured by the defendant's negligent operation of his vehicle (Davies v. Mann, 10 Mees. & W. 546, 152 Eng. Reprint 588, 19 Eng. Rul. Cas. 190). **It rests on the assumption that he is the more culpable whose opportunity to avoid the injury was later.**

"On the facts assumed by the Circuit Court of Appeals—that Merchant was driving the car recklessly, with respondent's encouragement or acquiescence—**the respondent and Merchant were engaged in a common venture, which, acting together, they were carrying on in a careless manner. In such a case their courses of conduct are not sufficiently independent to let it be said that either one or the other had in fact a later opportunity to avoid the consequences of their joint negligence.** (Compare St. Louis & S. F. R. Co. v. Schumacher, 152 U. S. 77, 38 L. ed. 361, 14 Sup. Ct. Rep. 479; Wheelock v. Clay [C. C. A. 8th], 13 F. [2d] 973; Kinney v. Chicago G. W. R. Co. [C. C. A. 8th], 17 F. [2d] 708; Denver City Tramway Co. v. Cobb, 90 C. C. A. 459, 164 Fed. 41).

"We think that the doctrine of the last clear chance was not involved here."

It is submitted that under the foregoing authority and the cases cited in support the last-clear-chance doctrine does not apply in this case, because the conduct of the engineer and the conduct of the conductor were not sufficiently independent to let it be said that either the one or the other had, in fact, a later opportunity to avoid the consequences of their joint negligence.

The last-clear-chance doctrine does not apply where, as

here, the engineer's negligent conduct continued with that of the conductor to the time of collision.

The conclusion was reached by this Court in the Caldine case, in a suit on behalf of the conductor, that recovery could not be had. Such conclusion was reached by the lower federal court in the companion case of Unadilla Valley R. Co. v. Dibble (C. C. A. 2nd, 1929) 31 Fed. (2d) 239, brought in behalf of the engineer injured in the same accident.

We therefore submit:

(1) That the petition allegation that the conductor, after discovery of the peril of the engineer, negligently failed to stop the train in time was not proved, because it was shown that the conductor only knew of the engineer's violation of the order at or after the collision, and because, as a matter of fact, it does not follow that, had the train been stopped, the collision would have been avoided with train 18 as it came around the curve, the engineer of that train having every reason to proceed in the belief that the track was clear.

(2) That the federal courts hold that the plaintiff must show actual knowledge before the doctrine of the last clear chance can be applied.

(3) That the last-clear-chance doctrine should not be applied where, as here, the causal negligence of the engineer in violating the order continued to the time of the

collision itself. Any negligence of the conductor could not, therefore, be later in point of time.

(4) It is a perversion of the act to permit a recovery caused by Simpson's violation of the stop-and-wait order as a result of which the collision, the deaths and loss of property occurred. Simpson's negligence is properly deemed the sole proximate cause of his injury.

We respectfully submit that this is a case in which the writ should properly issue.

Respectfully submitted,

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